Case C-417/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 July 2023

Referring court:

Østre Landsret – Nordhavn (Denmark)

Date of the decision to refer:

30 June 2023

Applicants:

Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge

XM

ZQ

FZ

DL

WS

JI

PB

VT

YB

TJ

RK

Defendants:

MV

EH

LI

AQ

LO

Social-, Bolig- og Ældreministeriet

Subject matter of the main proceedings

The main proceedings consist of five individual actions, cases 1 to 4 of which are actions, brought by the housing company SAB against five tenants, for a declaration that those tenants must recognise that the company's terminations of their leases are lawful (**Schackenborgvænge** in Slagelse), whilst case 5 was brought by 11 tenants for a review of the lawfulness of approval by the Social-, Bolig- og Ældreministeriet (Ministry of Social Affairs, Housing and the Senior Citizens) of the development plan for the **Mjølnerparken** area in Copenhagen.

A central theme of all the cases is whether the Danish rules on development plans reducing social family housing in so-called 'transformation areas' (formerly 'hard ghetto areas') entail discrimination on grounds of ethnic origin contrary to the Danish Law on equal treatment on grounds of ethnic origin and the underlying Directive 2000/43.

Similar questions are also being examined in a number of other cases before Danish courts, including seven cases before the Højesteret (Supreme Court) and two cases before the Retten i Aarhus (Aarhus District Court). The Supreme Court has decided to stay the cases pending before it, pending consideration by the Court of Justice of the European Union of preliminary questions in those cases.

Subject matter and legal basis of the request

Reference for a preliminary ruling pursuant to the second paragraph of Article 267 TFEU, in conjunction with the first paragraph of that article, on the interpretation of Article 2(2)(a) and (b) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Questions referred for a preliminary ruling

(1) Must the term 'ethnic origin' in Article 2(2)(a) and (b) of Directive 2000/43 be interpreted as meaning that that term, in circumstances such as those in the present case – where, under the Danish Law on social housing, there must be a reduction in the proportion of social family housing in

'transformation areas', and where it is a condition for categorisation as a transformation area that more than 50% of residents in a housing area are 'immigrants and their descendants from non-Western countries' – covers a group of persons defined as 'immigrants and their descendants from non-Western countries'?

(2) If the answer to the first question is wholly or partly in the affirmative, must Article 2(2)(a) and (b) be interpreted as meaning that the scheme described in this case constitutes direct or indirect discrimination?

Provisions of European Union and international law relied on

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Articles 1 and 2(1) and (2).

Judgments of the Court of Justice of 16 July 2015, *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraphs 46 to 60); of 6 April 2017, *Jyske Finans* (C-668/15, EU:C:2017:278, paragraphs 17 to 20); and of 10 June 2021, *Land Oberösterreich* (C-94/20, EU:C:2021:477).

UN's International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

UN's International Covenant on Economic, Social and Cultural Rights (ICESCR).

CERD decision in *Murat Er v. Denmark* (CERD/C/71/D/40/2007)

Provisions of national law relied on

Almenboligloven (Law on social housing) (Consolidated Law No 1877 of 27 September 2021 on social housing etc.)

The current provisions are contained in the Law on social housing, which provides that the social housing department(s) owning a housing area must, together with the municipal council, draw up a development plan for the social housing areas designated as 'transformation areas'. Indenrigs- og boligministeren (the Minister for the Interior and Housing) must approve the development plan.

In the development plan, the social housing organisation and the municipal council must set out how the proportion of social family housing in the housing area will be reduced to a maximum of 40% of the total number of dwellings by 1 January 2030. The development plan may therefore mean that leases of the tenants in the social housing area must be terminated.

The key provision in respect of the main proceedings is contained in Paragraph 61a of the Law on social housing, which was introduced by Law

No 1610 of 22 December 2010. The current terms in section 61a were introduced by Law No 2157 of 27 November 2021. The term 'parallel community' replaced 'ghetto', whilst the term 'transformation area' replaced the term 'hard ghetto area'. It was only the terminology that was amended.

Pursuant to Paragraph 61a(4) of the Law on social housing, a social housing area is designated a 'transformation area' (formerly 'hard ghetto area') if it has satisfied the conditions for constituting a 'parallel community' (formerly 'ghetto') for the past five years.

Under Paragraph 61a(1) and (2) of Law on social housing, a 'parallel community' is a housing area which meets at least two of four criteria relating to residents' attachment to the labour market, level of criminality, educational attainment and average income, and where more than 50% of the residents are 'immigrants and their descendants from non-Western countries'.

The current system of development plans etc. was introduced by Law No 1322 of 27 November 2018. It was in that connection that the requirement that the proportion of immigrants and their descendants from non-Western countries must exceed 50% was introduced as a necessary condition for constituting a 'ghetto area'. Prior to the draft law which led to the amendment, the government of the day had drawn up a plan in 2018 entitled 'Et Danmark uden parallelsamfund – Ingen ghettoer 2023' (A Denmark without parallel societies – No ghettos 2023), which emphasised the desire for a cohesive Denmark without parallel societies among people with a non-Western background who have no attachment to the local community. With reference to that plan, the draft law set out the desire to combat parallel societies as a basis for updating and consolidating the ghetto criteria. Under that draft law, a ghetto means a housing area where immigrants and their descendants from non-Western countries constitute more than 50% of residents and where at least two of the four ghetto criteria are met. The definition focuses on the fact that the central challenge in ghetto areas is the lack of integration of immigrants and their descendants from non-Western countries.

The terms 'immigrants', 'descendants', 'Western' and 'non-Western' are not defined in the Law on social housing or its *travaux préparatoires*. Reference is made instead to Danmarks Statistik (Statistics Denmark), which has drawn up definitions of those terms for statistical purposes. With regard to the latter two concepts, it states as follows:

Western countries

Western countries include the EU, Andorra, Australia, Canada, Iceland, Liechtenstein, Monaco, New Zealand, Norway, San Marino, Switzerland, the UK, the USA and the Vatican City State.

Non-Western countries

Non-Western countries include the European countries Albania, Belarus, Bosnia and Herzegovina, Kosovo, Macedonia, Moldova, Montenegro, Russia, Serbia, the Soviet Union, Türkiye, Ukraine and Yugoslavia. All countries in Africa, South and Central America and Asia. All countries in Oceania (other than Australia and New Zealand) and stateless persons.

Lov om etnisk ligebehandling (Law on equal treatment on grounds of ethnic origin) (Consolidated Law No 438 of 15 May 2012 on equal treatment on grounds of ethnic origin, as subsequently amended)

Article 2(2)(a) and (b) of Directive 2000/43 is implemented in Paragraph 3 of the Danish Law on equal treatment on grounds of ethnic origin, which is worded as follows:

> 'Paragraph 3.
>
> 1. No person may, either directly or indirectly, treat another person differently on the grounds of the racial or ethnic origin of the person concerned or of a third person.
>
> 2. Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.
>
> 3. Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice may result in persons of a given racial or ethnic origin being treated less favourably than other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
>
> …'

Succinct presentation of the facts and procedure in the main proceedings

1 A central theme of the cases in the main proceedings is whether the fact that, under Paragraph 168a(1) of the Law on social housing, there must be a reduction in social family housing in 'transformation areas' (formerly 'hard ghetto areas') constitutes discrimination on the basis of ethnic origin contrary to the Law on equal treatment on grounds of ethnic origin and the underlying directive. A transformation area means a housing area where, over the past five years, more than 50% of the population has been composed of 'immigrants and their descendants from non-Western countries' and where at least two of four criteria relating to the residents' attachment to the labour market, level of criminality, educational attainment and average income are also met.

2 The **Schackenborgvænge** housing area (cases 1 to 4) is social housing in the Ringparken housing area in Slagelse. Ringparken was designated a 'hard ghetto

area' with effect from 1 December 2018 because the housing area met all four criteria relating to residents' attachment to the labour market, level of criminality, educational attainment and average income and also because 55.6% of the residents belonged to the category 'immigrants and their descendants from non-Western countries'.

3 Accordingly, the affected housing associations (FOB and SABI), in co-operation with the Municipality of Slagelse, drew up a development plan for Ringparken, pursuant to Paragraph 168a(1) of the Law on social housing. Under the development plan, the proportion of social family housing is to be reduced to 40%, which in relation to Schackenborgvænge means re-designation of certain homes as youth housing, demolition of social family housing, sale to private individuals and construction of a new, private building. The development plan was approved by the Trafik, Bygge- og Boligstyrelsen (Transport, Building and Housing Authority) on 14 January 2020.

4 On 17 February 2020, SAB terminated 17 leases in Schackenborgvænge, including those of the five defendant tenants. The terminations were made in accordance with the approved letting criteria, and the tenants who had their leases terminated were, according to the information provided, not selected on the basis of whether they were 'immigrants or their descendants from non-Western countries'. The tenants were offered permanent rehousing.

5 As regards the tenants, in short, MV (case 1) was born in Türkiye and is a Danish national. There is no information about EH's (case 2) country of birth, parents or nationality. LI (case 3) was born in Bosnia and is a Bosnian national. As for AQ and LO (case 4), the former was born in Syria, whilst the latter was born in Lebanon. They have both acquired Danish nationality.

6 The tenants have all objected to the terminations and are now subject to an action brought by SAB claiming that they must recognise that the terminations are lawful. The five defendants have contended that the action should be dismissed and also that SAB must recognise that Paragraph 61a of the Law on social housing is invalid.

7 Since 1 December 2021, Ringparken has no longer been a transformation area as the housing area no longer meets the criteria relating to the proportion of residents with no connection to the labour market, the proportion of residents convicted of certain types of crime, and the average income of the residents. However, SAB is still obliged to implement the approved development plan for the area.

8 **Mjølnerparken** (case 5) is social housing in Copenhagen under the housing organisation Bo-Vita. Since 1 December 2018, Mjølnerparken has been designated a 'hard ghetto area' (now a 'transformation area') because since then the housing area has met three of the four criteria laid down in Paragraph 61a(1) of the Law on social housing and because also approximately 80% of the residents

in the area belong to the category ‘immigrants and their descendants from non-Western countries’. Mjølnerparken is still designated a ‘transformation area’.

9 On that basis, Bo-Vita drew up a development plan on 8 May 2019, which was approved by, among others, the Indenrigs- og Boligministeriet (Ministry of the Interior and Housing) (now the Social-, Bolig- og Ældreministeriet (Ministry of Social Affairs, Housing and the Senior Citizens)) on 10 September 2019. The plan involved the sale of certain apartment blocks. Accordingly, it falls to Bo-Vita to terminate the leases of the tenants in the affected blocks. The tenants have been offered rehousing.

10 The applicants in that case (case 5) are or were tenants in the blocks concerned. As regards those tenants, in short, XM was born in Pakistan and has acquired Danish nationality. ZQ was born in Lebanon and has Danish nationality. FZ was born in Pakistan and has Danish nationality. DL was born in Syria and has Danish nationality. WS was born in Syria and has Danish nationality. JL was born in Syria and was a stateless Palestinian before obtaining Danish nationality. PB was born in Syria and was a stateless Palestinian before obtaining Danish nationality. VT was born in Libya and has Danish nationality. YB was born in Denmark and has Danish nationality. TJ was born in Denmark and has Danish nationality. RK was born in Denmark and has Danish nationality. Her parents were both born in Lebanon and have Danish nationality.

11 On 27 May 2020, the applicants brought an action against the Ministry of Social Affairs, Housing and the Senior Citizens, claiming that the ministry’s approval on 10 September 2019 of the development plan for Mjølnerparken is invalid, inter alia because the plan is based on Paragraph 61a(4) of the Law on social housing. The ministry contended that the action should be dismissed.

12 The cases in both the Schackenborgvænge cases and the Mjølnerpark case have been referred to the Østre Landsret for examination at first instance since it is considered that the cases raise issues of principle.

The essential arguments of the parties in the main proceedings

The Schackenborgvænge cases (cases 1 to 4)

13 The applicant, the housing company SAB, stated, inter alia, that the termination of the defendants’ leases was carried out on the basis of the almenlejeloven (Law on renting social housing) and that SAB had no influence on the area being categorised as a ‘hard ghetto area’ (now ‘transformation area’) on 1 December 2018, and it is obliged to comply with the rules of the Law on social housing, including Paragraphs 168a and 168b on reducing the proportion of social family housing to a maximum of 40% in ‘transformation areas’.

14 The terminations do not constitute unlawful discrimination contrary to Paragraph 3 of the Law on equal treatment on grounds of ethnic origin. There is

neither direct nor indirect discrimination based on the ethnic origin of the tenants. SAB did not select the 17 tenants whose leases have been terminated on the basis of their racial or ethnic origin. The criteria for the terminations are partly the tenants' income base and partly whether the tenant or others in the tenant's household have committed a crime within the last six months.

15 It follows from Article 3(2) of the Equal Treatment Directive that the directive does not cover discrimination on the basis of nationality, but only discrimination on the basis of racial or ethnic origin. At the same time, it is acknowledged that in certain areas, individual States have an interest in and a need to be able to discriminate on grounds of nationality. The term 'immigrants and descendants from non-Western countries' is a national one since 'non-Western countries' are defined as: 'all countries other than Western countries' and thus includes at least 155 countries. Today, approximately 940 000 000 people live in Western countries, whilst approximately 7 060 000 000 people live in non-Western countries. The population of the world's non-Western countries thus makes up approximately 88.25% of the world's population.

16 The defendant tenants have argued, inter alia, that SAB is obliged to comply with Danish law, but not where it conflicts with international obligations.

17 This case involves direct discrimination. Paragraph 61a of the Law on social housing is inconsistent with the Equal Treatment Directive.

The Mjølnerparken case

18 The applicant tenants have argued, inter alia, that the term 'racial or ethnic origin' in Article 2(2)(a) of the Equal Treatment Directive must be interpreted as covering the criterion 'immigrants and descendants from non-Western countries' and that the provision prevents a group of residents – both Western and non-Western – in a housing area from being having their leases terminated on the grounds that, inter alia, the proportion of 'immigrants and their descendants from non-Western countries' exceeds 50%.

19 The term 'persons of a racial or ethnic origin' in Article 2(2)(b) of the directive on indirect discrimination must also be interpreted as meaning that the criterion 'immigrants and descendants of non-Western countries' is covered by the provision, and the provision therefore also precludes a group of residents from having their leases terminated on the ground that, inter alia, the proportion of 'immigrants and their non-Western descendants' exceeds 50%. The criterion is not an 'apparently neutral condition', as provided for in Article 2(2)(b).

20 However, if – notwithstanding the above – the view is taken that there is an 'apparently neutral provision, criterion or practice', it is argued that the criterion is precisely sufficiently related to persons of a 'particular' [DA *'bestemt'* – absent from EN version of the directive] racial or ethnic origin. The group of residents

with a non-Western background makes up over 80% of the residents in the housing area.

21 Even if the view were taken that the criterion cannot in itself be deemed to cover persons of a [particular] racial or ethnic origin as referred to in Article 2(2)(b), it is argued that the specific statistical information shows that the largest groups of residents affected by the development plan for Mjølnerparken have a Lebanese or Somali background, which is deemed to constitute a particular racial or ethnic group.

22 It is further argued that the use of the criterion is not deemed to pursue a legitimate objective. The purpose is to reduce the number of social family houses in order to make the area an 'attractive housing area', inter alia by ensuring a mix of housing types and thus a changed resident composition. When this is compared to the underlying purpose of 'eradicating ghettos', which is decisively defined as more than 50% of residents in an area having a non-Western background, the real purpose of approving a development plan is clearly to ensure the removal of residents with a non-Western background. Precisely the loss of a family house has been found by the Court of Justice of the European Union to constitute extreme interference with fundamental rights.

23 The defendant, the Ministry of Social Affairs, Housing and the Senior Citizens, has submitted, inter alia, that the term 'ethnic origin' in Directive 2000/43 must be interpreted as not covering the category 'immigrants and their descendants from non-Western countries'.

24 Therefore, the fact that Paragraph 168a of the Law on social housing requires the social housing associations in a housing area categorised as a 'transformation area' (formerly 'hard ghetto area') to draw up a development plan for the housing area does not constitute direct discrimination under Article 2(2)(a) of the directive. That is the case even though, pursuant to Paragraph 61a(2) of the Law on social housing, it is an independent condition for categorisation as a 'transformation area' that more than 50% of the residents in that area are so-called 'immigrants and their descendants from non-Western countries'.

25 The category 'immigrants and their descendants from non-Western countries' was developed by Danmarks Statistik for statistical purposes and appears in several places in Danish legislation. The assessment as to whether a person belongs to the category is based exclusively on the person's place of birth and the place of birth and/or nationality of the person's parents.

26 The extremely broad range of persons covered by the category 'immigrants and their descendants from non-Western countries' has no common features in terms of nationality, language, cultural and traditional origins and backgrounds, or common customs, beliefs, traditions and characteristics stemming from a common or presumed common past.

27 Thus, there is no direct and inextricable connection between the category 'immigrants and their descendants from non-Western countries' set out in Paragraph 61a(2) of the Law on social housing – which covers more than half of the world's population – and the term 'ethnic origin', as it appears in Directive 2000/43.

28 Nor does the rule in the Law on social housing constitute indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/43.

29 The applicants have merely referred to statistics showing that the largest groups of residents in Mjølnerparken have a Lebanese and Somali background. Also in that respect, the applicants confuse 'ethnic origin' with 'nationality', which is certainly not covered by Directive 2000/43 (see Article 3(2) thereof).

30 In the last place, Paragraph 61a(2) of the Law on social housing is applied without distinction to all persons belonging to the category of 'immigrants and their descendants from non-Western countries' and, in any event, the rules of the Law on social housing are intended to ensure successful integration, which constitutes an overriding reason in the general interest under EU law. Lastly, the rules are proportionate as they are both appropriate and necessary as measures to promote integration.

31 The co-interveners in the case are the Institut for Menneskerettigheder (Danish Institute for Human Rights) (cases 1 to 4 as well as case 5) and the UN Special Rapporteurs (case 5).

32 The Institut for Menneskerettigheder has, among other things, argued that the approval of the development plan (Mjølnerparken) and the termination of the leases (Schackenborgvænge) constitute direct discrimination on the basis of ethnic origin because emphasis was placed on the criterion 'immigrants and their descendants from non-Western countries' and because that criterion is directly and inextricably linked to ethnic origin. Ethnicity is thus decisive in the decision to implement a measure which results in less favourable treatment, just as the less favourable treatment is introduced for reasons related to ethnic origin. The criterion 'immigrants and their descendants from non-Western countries' is directly and inextricably linked to ethnic origin. It appears in several places in the *travaux préparatoires* of the law etc. that the legislature wished to address problems with a specific population group on the basis of ethnic origin. The purpose of the criterion is to target a specific population group in Denmark, which, according to the *travaux préparatoires*, differs from the majority of the Danish population on account of its standards and values, which relate to the citizens' descent, national, genealogical and cultural affiliation and origin. Such a division of the population is a division by ethnic origin.

The UN Special Rapporteurs have stated, inter alia, that 'immigrants and their descendants from non-Western countries' is not a neutral category, but is based on descent, race, and ethnic and national origin, and that the categorisation gives rise

to direct and indirect racial discrimination. The use of the 'non-Western' category to determine housing development policy and subject tenants to displacement from their homes that is neither necessary nor justified is a breach of Denmark's legal obligations under the ICERD and ICESCR. The division into 'Western' and 'non-Western' and the use of the latter category to authorise housing renovation and distinguish between 'vulnerable housing areas', 'ghettos' and 'hard ghettos' constitutes prohibited direct discrimination on the basis of descent and national or ethnic origin. Although the category of countries which constitute 'Western' countries is geographically incoherent, it consists primarily of European nations and European settler colonial nations where most or the majority of citizens are white. Conversely, countries on the 'non-Western' list are primarily non-white nations, including all Muslim-majority nations of the world. 'Vulnerable housing areas' with socio-economic indicators identical to 'the ghettos' – unlike areas where more than 50% of the residents are 'non-Western' – are not subject to the extended renovation requirements if they are communities with a majority of 'Western' residents. This therefore is a teleological distinction based on the ethnic nature of the areas. The fact that the category 'non-Western' includes people of various national or ethnic origins does not exclude the possibility of racial discrimination. Moreover, the tenants are being subject to racial discrimination by infringement of their right to housing. Non-discrimination and equal treatment are fundamental principles of the right to adequate housing, as set out in Article 11 of the ICESCR. Reference is also made to Article 2(2) and to Article 5(e)(iii) of the ICERD. The tenants' legal security of tenure and the location and adequacy of housing, which are among the seven core components of the right to adequate housing as formulated by the UN Committee on Economic, Social and Cultural Rights in its General Comment No 4, are jeopardised in this case simply because they are – or live next to – 'non-Western' residents of 'hard ghetto areas'.

Succinct presentation of the reasoning in the request for a preliminary ruling

33 The Østre Landsret considers that it is not possible to deduce from the wording of Article 2 of the directive or the case-law of the Court of Justice whether the term 'ethnic origin' in Article 2(2)(a) and (b), in circumstances such as those in the present case – where, under the Danish Law on social housing, there must be a reduction in social family houses in 'transformation areas' and where it is a condition for categorisation as a transformation area that more than 50% of residents in a housing area are 'immigrants and their descendants from non-Western countries' – must be interpreted as including a group of persons defined as 'immigrants and their descendants from non-Western countries'.

34 If it must, the Østre Landsret is also uncertain whether Article 2(2)(a) and (b) must be interpreted as meaning that the scheme described in the present case constitutes direct or indirect discrimination.

35 Since clarification of these matters is of decisive importance to the outcome of the cases in the main proceedings, the Østre Landsret considers it necessary to ask the

Court of Justice of the European Union to answer the questions referred for a preliminary ruling.